Suruhanjaya Sekuriti v Datuk Ishak bin Ismail & Anor

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(NCC)-366–09 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
13 FEBRUARY 2017

B

Civil Procedure — Stay of proceedings — Application for — Appellant filed application for stay of civil suit pending criminal proceedings against first respondent pursuant to O 92 r 4 of the Rules of Court 2012 — Whether there were special circumstances warranting stay application — Whether danger of inconsistency of findings between courts hearing civil suit and criminal proceedings purely speculative — Whether criminal proceedings ought to be filed earlier — Federal Constitution art 145(3) — Rules of Court O 92 r 4

C

D

The appellant had filed a stay application pursuant to O 92 r 4 of the Rules of Court 2012 to stay a civil suit filed by the appellant against the first respondent ('the civil suit') pending the disposal of a criminal proceedings ('the criminal proceedings') instituted against the first respondent in the sessions court. Both the civil suit and criminal proceedings arose from insider trading acts committed by the first respondent. The trial court had dismissed the stay application, hence the present appeal. The grounds of appeal as submitted by the appellant were that: (a) the learned judge erred in law and fact when found that there were no special circumstances warranting the stay application; (b) the learned judge erred when finding that the danger of inconsistency of finding of fact and law between the courts hearing the civil suit and the criminal proceedings were purely speculative; (c) the learned judge failed to follow the English Court of Appeal's decision in *Jefferson v Bhetcha* [1979] 2 All ER 1108 ('*Jefferson*'s case'); (d) the learned judge erred in law when determining that the stay application should be refused because the appellant ought to have preferred the criminal charges at a later stage, after the disposal of the civil suit, because the charges were preferred by the attorney general ('the AG'); and (e) the learned judge was wrong in law and fact in failing to appreciate that the civil suit was required to be filed urgently in 2010 in order that the appellant could obtain an ex parte order dated 14 June 2010 pursuant to s 360 of the Capital Markets and Services Act 2007 ('the Act') by which the proceeds of the first respondent's breaches of ss 177 and 188 of the Act were restrained.

E

F

G

H

I

Held, allowing the appeal, setting aside the order of the High Court and substituting the order with an order that the civil suit be stayed until the conclusion of the criminal proceedings in the sessions court:

(1) Contrary to the plaintiff in *Jefferson*'s case, the first respondent herein suffered no prejudice at all from a stay of the civil suit because he was the defendant. As the criminal proceedings had already been set down for trial, it would be 'that if the criminal proceedings were likely to be hearing in a very short time ... it would be fair and sensible to postpone the hearing of the civil action'. A stay of the proceedings in the civil suit would also avoid the potentially embarrassing outcome, in the form of conflicting decisions on the same facts by the two courts hearing the criminal proceedings and the civil suit. There was so much commonality of facts and issues as well as a strong likelihood of overlap in the evidence in both proceedings which would make conflicting decisions potentially an ineluctable fact. Thus, the possibility of inconsistent findings by both courts on the same facts could not be dismissed as purely speculative and one that could be resolved on appeal (see para 21).

(2) The learned judge's findings that the criminal proceedings was made a tad late in the day was misplaced because His Lordship did not seem to realise that the decision to commence the criminal proceedings was made by the AG in the exercise of his constitutional function pursuant to art 145(3) of the Federal Constitution and not the appellant who was devoid of such power and was thus totally out of the appellant's control. In totality, the learned judge had exercised his discretion wrongly as it was obvious that the grounds discussed above amounted to special circumstances upon which His Lordship ought to have exercised his discretion to grant the stay application (see paras 22–23).

[Bahasa Malaysia summary

Perayu telah memfailkan permohonan penggantungan bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012 untuk menangguhkan saman sivil yang difailkan oleh perayu terhadap responden pertama ('saman') sementara menunggu prosiding jenayah ('jenayah prosiding') dimulakan terhadap responden pertama di mahkamah sesyen. Kedua-dua saman sivil dan prosiding jenayah timbul berikutan perbuatan perdagangan dalaman oleh responden pertama. Mahkamah bicara telah menolak permohonan tersebut. Oleh itu, timbul rayuan ini. Alasan rayuan, seperti yang dikemukakan oleh perayu, adalah: (a) Yang Arif Hakim terkhilaf dalam undang-undang dan fakta apabila mendapati wujud keadaan khusus yang mewajarkan permohonan tersebut; (b) terkhilaf apabila mendapati bahawa bahaya ketidakselarasan dapatan fakta dan undang-undang antara mahkamah mendengar saman sivil dan prosiding jenayah adalah spekulasi semata-mata; (c) hakim berkenaan gagal mematuhi keputusan Mahkamah Rayuan Inggeris dalam *Jefferson v Bhetcha* [1979] 2 All ER 1108 ('kes *Jefferson*'); (d) Yang Arif Hakim terkhilaf dalam undang-undang apabila menentukan bahawa permohonan penggantungan boleh ditolak kerana perayu sepatutnya memilih pertuduhan jenayah pada peringkat kemudiannya, selepas pelupusan saman sivil kerana pertuduhan pilihan oleh

peguam negara; dan (e) hakim terkhilaf dalam undang-undang dan fakta apabila gagal mempertimbangkan bahawa saman sivil perlu difailkan segera pada 2010 agar perayu boleh mendapat perintah ex parte bertarikh 14 Jun 2010 bawah s 360 daripada Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta') yang mana hasil pelanggaran responden pertama ss 177 dan 188 Akta telah dihalang.

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi dan menggantikan perintah tersebut dengan satu perintah bahawa saman sivil ditangguhkan hingga berakhirnya prosiding jenayah di mahkamah sesyen:

(1) Berlainan dengan plaintif dalam kes *Jefferson*, responden pertama dalam kes ini tidak mengalami prejudis sama sekali berdasarkan satu penggantungan saman sivil kerana dia adalah defendan. Oleh kerana prosiding jenayah telah ditetapkan bagi perbicaraan, ini akan menjadi 'that if the criminal proceedings were likely to be hearing in a very short time ... it would be fair and sensible to postpone the hearing of the civil action'. Satu prosiding penggantungan prosiding dalam saman sivil juga akan mengelakkan keputusan yang memalukan, dalam bentuk keputusan yang bercanggah mengenai fakta yang sama dengan kedua-dua mahkamah mendengar prosiding jenayah dan saman sivil itu. Terdapat begitu banyak persamaan fakta dan isu-isu serta kemungkinan besar pertindihan keterangan dalam kedua-dua prosiding yang menghasilkan keputusan bercanggah adalah fakta yang tidak dapat dihindari. Oleh itu, kemungkinan penemuan yang tidak konsisten oleh kedua-dua mahkamah mengenai fakta yang sama tidak boleh ditolak sebagai semata-mata spekulasi dan sesuatu yang boleh diselesaikan dengan rayuan (lihat perenggan 21).

(2) Dapatan hakim bahawa prosiding jenayah sedikit terlewat adalah satu salah tanggapan kerana beliau seolah-olah tidak sedar bahawa keputusan untuk memulakan prosiding jenayah telah dibuat oleh peguam negara dalam menjalankan fungsi perlembagaan menurut perkara 145(3) Perlembagaan Persekutuan dan bukan perayu yang tidak mempunyai apa-apa kuasa dan dengan itu sama sekali di luar kawalan perayu. Secara keseluruhannya, hakim tersebut menjalankan budi bicaranya dengan khilaf salah kerana jelas bahawa alasan yang telah dibincangkan terjumlah kepada keadaan tertentu di mana beliau sepatutnya menjalankan budi bicara yang ada untuk meluluskan permohonan penggantungan (lihat perenggan 22–23).]

Notes

For cases on application for stay of proceedings, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9008–9058.

Cases referred to

Dato' Ding Lian Cheon v Yap You Jee & Ors [1999] 3 MLJ 209; [1999] 8 CLJ 98, HC (refd)

Jefferson Ltd v Bhetcha [1979] 2 All ER 1108, CA (distd)

Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733, FC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 177, 182, 188, 188(2), (4), 200(1), (5), (6), 201(5), (6), 360

Federal Constitution art 145(3)

Rules of Court 2012 O 92 r 4

Rules of the High Court 1980 O 24 r 7

Securities Commission Malaysia Act 1993 ss 15, 134

Appeal from: Civil Suit No 22NCC-968–06 of 2012 (High Court, Kuala Lumpur)

Tommy Thomas (Zul'aida Zulkifli with him) (Tommy Thomas) for the appellant.

Gopal Sreenevasan (Mark Lau with him) (Sreenevasan Young) for the first respondent.

Aaron Chelliah (Ranjit Singh & Yeoh) for the second respondent.

Idrus Harun JCA (delivering judgment of the court):

[1] By notice of application dated 13 July 2016, the appellant in this particular case applied pursuant to O 92 r 4 of the Rules of Court 2012 to stay all further proceedings in the High Court Civil Suit No D-24NCC-968–06 of 2012 ('the civil suit') until the conclusion of the hearing and final disposal of the criminal proceedings instituted by the appellant against the first respondent in the Kuala Lumpur Sessions Court Arrest Case No 62SC-004–06 of 2016 ('the criminal proceedings') and any appeal arising therefrom ('the stay application'). The High Court in its decision given on 19 August 2016 dismissed the stay application. The appeal before us is directed against the said High Court's decision. We heard both learned counsel for the appellant and the respondent and accordingly allowed the appeal unanimously. However, the stay of the proceedings in the civil suit was allowed until the completion of the criminal proceedings in the sessions court.

[2] We shall begin by laying down a summary of some of the material facts and thereafter deliberate upon the merits of, and give our reasons for, allowing the appeal. The grounds of the stay application are specified in the affidavit affirmed by Zul'Aida Zulkifli on 13 July 2016. In opposing the stay application, the first respondent filed his affidavit deposed on 26 July 2016. Before proceeding further, we may mention that the second respondent is a

party to the civil suit by way of an intervention pursuant to the court order dated 20 October 2010. In its defence, the second respondent pleaded that it was appointed by the first respondent as trustee for the benefit of the first respondent's family.

[3] The civil suit, which is the subject of this appeal, was instituted by the appellant against the first respondent who, in the opinion of the appellant had breached certain laws relating to securities because of his involvement in Kenmark Industrial Co (M) Bhd ('Kenmark'). From what we were able to glean upon perusal of the appellant's amended statement of claim and affidavit in support of the stay application, Kenmark was at all material times in the business of supplying, amongst others, electronic goods and furniture to internationally based supermarkets such as Wal-Mart. Kenmark had commenced its business operations in Malaysia in 1989 and operated factories here and in Vietnam. Its shares were listed on Bursa Malaysia in 1997. Thousands of individual Malaysian investors owned shares in Kenmark. In 2010, Kenmark employed approximately 400 people at its Malaysian factory.

[4] On 27 May 2010, the Managing Director of Kenmark, James Hwang Ding Kuo ('Hwang'), a Taiwanese national, left Malaysia and was not contactable at all. News of Hwang's departure was widely and negatively reported in the media. At the same time, EON Bank Bhd ('EON Bank'), acting pursuant to rights conferred under a debenture, seized Kenmark's stock, placed security guards at Kenmark's factory and appointed a receiver to safeguard its rights under the debenture. News of these developments were also widely and negatively reported in mainstream media. On 31 May 2010, Kenmark failed to submit its fourth quarter financial statements leading to the suspension of the trading of its shares on Bursa Malaysia. The suspension was eventually lifted by Bursa Malaysia on 1 June 2010. Kenmark's share price on suspension was 11 sen per share. It had plunged from 81 sen on 20 May 2010. The manner in which Kenmark's affairs were conducted by its senior management from late May 2010 and early June 2010 was alleged to have led to the crash of its share price principally because the market lost confidence in its management.

[5] Despite this state of affairs in Kenmark which was public knowledge, the first respondent on the second and third June 2010 acquired 57,691,900 shares in Kenmark. On 10 June 2010, the first respondent purchased a further 1,000,000 shares in Kenmark. The first respondent thus purchased a total of 58,691,900 shares in Kenmark which amounted to 32.36% of its share capital, for a total purchase consideration of RM3,858,353, that is, at RM0.06 per share in a three day buying spree. In the period following his initial acquisition of Kenmark shares on 2 June 2010 and spanning the six days between 3–10 June 2010, the first respondent made several public statements on Kenmark to the press, to the effect that there was nothing wrong with

Kenmark, he intended to restart operations at Kenmark's plant and revive Kenmark because it was a good company with significant export earnings. These statements were widely reported and contributed to a rise in Kenmark's share price.

[6] As events transpired and contrary to his public statements as earlier mentioned, the first respondent, on 9 June 2010 and 11 June 2010 sold 27,691,900 shares for a total gross sum of RM5,299,247 at 19 sen per share and 31,000,000 shares for a total gross sum of RM4,861,389 at 16 sen per share respectively. The total monies realised by the first respondent was RM10,160,636 which amounted to a profit of RM6,302,303.13 for a six day investment. The first respondent completed the sale of all his Kenmark shares by 11 June 2010. On 14 June 2010 the appellant commenced investigations into the first respondent after tip-offs from members of the public, including dissatisfied shareholders of Kenmark.

[7] Being told that some of the first respondent's sale proceeds might still be in the possession of his stock-broker, the appellant decided to take urgent court action by instituting civil proceedings pursuant to ss 200(1) and 201(5) of the Capital Markets and Services Act 2007 ('the CMSA') on 16 June 2010 by way of an originating summons alleging, inter alia, that the first respondent:

(a) was an 'insider' and had committed 'insider trading' within the meaning of s 188 of the CMSA when he sold his shares in Kenmark for a profit of RM6,302,283; and

(b) made false or misleading statements or disseminated false or misleading information to the public which were likely to induce the purchase of shares within the meaning of s 177 of the CMSA, when he made the press statements.

[8] On the same day (ie 16 June 2010), Justice Mah Weng Kwai allowed the appellant's application made by summons in chambers of even date for interim orders pursuant to s 360 of the CMSA ('ex parte orders') restraining the first appellant from dealing with the proceeds of sale of Kenmark shares. On 16 July 2010, Justice Abdul Aziz Abdul Rahim dismissed the first respondent's application to set aside the ex parte orders. On 24 June 2010, the civil suit was converted from an originating summons action to a writ action. The trial of the civil suit was set down for ten days in May 2011. The appellant and its lawyers began preparing for trial.

[9] On 12 April 2011, the respondent applied by way of summons in chambers under O 24 r 7 of the Rules of the High Court 1980 for, inter alia, discovery of all the statements recorded by investigating officers of the appellant from witnesses in the course of the investigations pursuant to s 134 of

the Securities Commission Malaysia Act 1993. On 4 May 2011, the High Court allowed the first respondent's application, but ordered a stay of proceedings in the civil suit pending the disposal of the appellant's appeal against that decision. On 10 November 2011, the appellant's appeal to the Court of Appeal was heard and dismissed. On 28 February 2012, the appellant was given leave to appeal to the Federal Court on a novel point of law on the issue of whether statements of witnesses recorded by the appellant's investigating officers were admissible in civil proceedings and therefore discoverable.

[10] In a landmark decision, the Federal Court on 19 January 2016, unanimously allowed the appellant's appeal when it upheld the confidentiality of statements made by whistleblowers and witnesses alike, not just to the appellant's investigating officers carrying out their investigations, but to all public officers carrying out investigative functions. That decision has been reported as *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733. The stay of proceedings of the civil suit in the High Court was lifted on the same day. It had been in place for some four years six months. At a case management on 12 May 2016, the civil suit was set down for 13 days of trial, from 6–9 December 2016, 6–9 and 13–17 February 2017. A common bundle of documents was filed and the appellant was prepared to proceed with the trial of the civil suit.

[11] On 16 June 2016, the criminal proceedings, which also arose from those insider trading acts, were instituted against the first respondent. According to the appellant, this is the first time that concurrent civil and criminal proceedings have been brought against a person for breaching the securities laws. Three criminal charges were preferred by the public prosecutor against the first respondent in the criminal proceedings for the same insider trading acts which formed the subject matter of the civil suit. Article 145(3) of the Federal Constitution provides that the power to institute, conduct or discontinue any proceedings for an offence shall be exercisable at the sole discretion of the attorney general. The decision to charge the first respondent and the timing of that decision, was therefore completely out of the appellant's control. The appellant only recommended to the attorney general that charges be brought against the first respondent based on its investigations. The trial of the criminal proceedings was set down for seven days on 7, 8, 14–17 and 21 November 2016. On 13 July 2016, the appellant filed the stay application, to stay the civil suit pending the disposal of the criminal proceedings.

[12] As earlier stated, on 19 August 2016, the High Court dismissed the appellant's stay application. In dismissing the stay application, the learned judge held that the appellant failed to show special circumstances to warrant a

stay of the civil suit adding that the criminal proceedings were only brought six years after the civil suit when parties were ready for the civil trial. The learned judge further stated that the appellant waited for six years before commencing the criminal proceedings against the first appellant, that perhaps, it should have preferred the charges against the first respondent after the conclusion of the civil suit. On the appellant's argument that similar and common issues of fact and law would be raised in both proceedings, the learned judge held that the fear of inconsistent findings of fact and law was purely speculative.

[13] The issues on which the appeal turns are set out in the memorandum of appeal which can be neatly summarised as follows:

(a) the learned judge had erred in law and on the facts that there were no special circumstances warranting a stay of the civil suit pending the final disposal of the criminal proceedings on the peculiar facts of this case;

(b) the learned judge had erred when finding that the danger of inconsistency of finding of fact and law between the courts hearing the civil suit and the criminal proceedings was purely speculative;

(c) the learned judge failed to follow the English Court of Appeal's decision in *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108;

(d) the learned judge was wrong in law when determining that the stay application should be refused, inter alia, because the appellant ought to have preferred the criminal charges at a later stage, after the disposal of the civil suit, because the charges were preferred by the attorney general; and

(e) the learned judge was wrong in law and fact in failing to appreciate that the civil suit was required to be filed urgently in 2010 in order that the appellant could obtain an ex parte order dated 14 June 2010 pursuant to s 360 of the CMSA by which the proceeds of the first respondent's breaches of ss 177 and 188 of the CMSA were restrained.

[14] Before turning to the core issues of this appeal, we may mention that the appellant is not an ordinary private litigant but the regulatory authority for the securities industry of Malaysia. The appellant as the regulatory authority established by the Securities Commission Malaysia Act 1993, we apprehend, performs its functions as set out in s 15 thereof to, inter alia:

(a) regulate all matters relating to securities and futures contracts;

(b) ensure that the provisions of the securities laws are complied with;

(c) take all reasonable measures to maintain the confidence of investors in the securities and futures markets by ensuring adequate protection for

such investors; and

(d) suppress illegal, dishonourable and improper practices in dealings in securities and trading in futures contracts.

The CMSA also empowers the appellant to institute either civil or criminal proceedings or both, against a person suspected by it of committing offences under the securities laws. Thus, while the appellant may pursue criminal charges against perpetrators of financial or securities fraud, it may also simultaneously institute civil proceedings to, inter alia, seek injunctive relief to prevent the dissipation of proceeds of such fraud, to be later applied in restitution of the victims of such fraudulent schemes.

[15] Section 177 of the CMSA prohibits a person from making a false or misleading statement that is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities whereas s 188 thereof deals with insider trading where it prohibits a person from trading in securities based on information which is not in the public domain. Any contravention of ss 177 and 188 of the CMSA is an offence punishable on conviction under ss 182 and 188(4) thereof respectively with a term of imprisonment of up to ten years and a fine of up to RM1m.

[16] The appellant is also vested with the power under ss 200(1), 201(5) and (6) of the CMSA to institute civil proceedings against a person who contravenes ss 177 and 188(2) of the CMSA 'whether or not that person has been charged with an offence, or whether or not a contravention has been proved in a prosecution'. The appellant is therefore empowered by the express provisions of ss 200(1), (5) and (6) and ss 182 as well as 188(4) of the CMSA to bring civil or criminal proceedings, or both, against any person who breaches ss 177 and 188 of the CMSA.

[17] We now turn to the arguments that had been pressed on us by both parties in this appeal. To start off, we shall state briefly the appellant's grounds in support of the stay application which, we would emphasise, form the basis of learned counsel's submission before us. These are:

(a) there were common issues and a strong likelihood of overlap in the evidence in both the criminal proceedings and the civil suit although the burden of proof differed in each set of proceedings;

(b) it was highly unlikely that the criminal proceedings would conclude, or that any decision would be delivered by the sessions court, before the trial of this civil suit commence on 6 December 2016;

(c) thus, if the trial of this civil suit proceeded before the conclusion of the criminal proceedings and appeals arising therefrom, there was a danger that the High Court and the sessions court hearing the criminal proceedings might make different findings on the same facts and issues;

(d) notwithstanding the fact that this civil suit was filed and set down before the criminal proceedings were brought by the appellant, the criminal proceedings ought to be heard and disposed of first because the first respondent's personal liberty was at stake, and in view of the fact that custodial sentences were prescribed for convictions of offences under ss 177 and 188 of the CMSA;

(e) the above grounds amounted to special circumstances upon which the High Court ought to exercise its discretion to grant the stay application; and

(f) a stay of proceedings in this civil suit until the final disposal of the criminal proceedings and any appeal arising therefrom, would not prejudice the first respondent in any way.

[18] The essential point that had been urged for the first respondent was that the court had a discretion whether to stay the civil suit proceedings taking into account all circumstances and that the appellant was not entitled as of right to have the civil suit stayed because of the pending criminal proceedings. Learned counsel emphasised that case law suggested that applications to stay civil proceedings pending the conclusion of criminal proceedings were generally made by the defendant as it was the defendant who invariably felt prejudiced by his so called 'right of silence' and in having to participate as well as to disclose in the civil action what his defence was likely to be in the criminal proceedings. Learned counsel next submitted that what was obvious was that the grounds for the stay application did not satisfy the test upon which the court could exercise its discretion to stay the civil suit proceedings pending the conclusion of the criminal proceedings. The first respondent had also made clear of his position that he was prepared to proceed to defend both sets of proceedings concurrently.

[19] We had been referred to the decision of the Court of Appeal of England in *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 in which Megaw LJ dealt with a situation where a defendant in a civil action sought a stay of proceedings pending the conclusion of criminal proceedings against her, both of which arose from the same set of facts. The plaintiff in the civil action objected, and the court in balancing the plaintiff's right to pursue its claim against the prejudice suffered by the defendant from having two concurrent proceedings, at p 1112 laid out the following factors relevant to the grant of a stay of a civil proceedings pending the conclusion of criminal proceedings arising from the same acts or transactions:

As I understand it, the judge based his decision on the view that there is an established principle of law that, if criminal proceedings are pending against a defendant in respect of the same subject-matter, he, the defendant, is entitled to be excused from taking in the civil action any procedural step, which step would, in the ordinary way, be necessary or desirable for him to take in furtherance of his defence in the civil action, if that step would, or might, have the result of disclosing, in whole or in part, what his defence is, or is likely to be, in the criminal proceedings. Counsel for the defendant in this court submitted that is the general rule which ought to be followed ... With the view, if it were put forward, that this is an established principle of law, I would respectfully but firmly disagree. There is no such principle of law. There is no authority which begins to support it, other than, to a limited extent, *Wonder Heat Pty Ltd v Bishop*, which, with great respect, I should not be prepared to follow, if indeed it does purport to lay down such a principle. I do not think that it does.

I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a master, a judge, or this court, would have a discretion, under s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice (the balancing of justice between the parties) so required, having regard to the concurrent criminal proceedings and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the 'right of silence' and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right.

... In my judgment, while each case must be judged on its own facts, the burden is on the defendant in the civil action to show that is just and convenient that the plaintiff's ordinary rights of having his claim processed and heard and decided should be interfered with. Of course, one factor to be taken into account, and it may well be a very important factor, is *whether there is a real danger of the causing of injustice in the criminal proceedings*. There may be cases (no doubt there are) where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. It *may be that, if the criminal proceedings were likely to be heard in a very short time ... it would be fair and sensible to postpone the hearing of the civil action*. It might be that it could be shown, or inferred, that there was some *real*, not merely notional, *danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings*, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way ... (Emphasis added.)

[20] The principles developed by Megaw LJ in the above case were applied and held to be good law in Malaysia by Justice Abdul Malik Ishak sitting in the High Court in *Dato' Ding Lian Cheon v Yap You Jee & Ors* [1999] 3 MLJ 209; [1999] 8 CLJ 98. In *Dato' Ding Lian Cheon*, the plaintiff, alleging that he had been cheated of his money by the defendants, lodged a police report as a result of which the defendants were charged in the sessions court. The plaintiff then

commenced a civil action against the defendants to recover his money after which he filed the application to stay the civil proceedings pending the completion of the criminal proceedings. The criminal proceedings had reached the stage of the prosecution having closed its case at the time of hearing this application for stay.

Justice Abdul Malik Ishak J said:

> In deciding whether a stay of civil proceedings should be granted until conclusion of criminal proceedings and where there are concurrent civil and criminal proceedings in respect of the same subject matter, this court having control of the civil proceedings could, in the exercise of its discretion, stay those proceedings if it appears to the court that justice so requires having regard to the defendants' right of silence in relation to the concurrent criminal proceedings. An important factor to be taken into account by this court in deciding whether to grant a stay was whether there was a real and not merely a notional damage that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings. In my judgment, there was no impediment for the plaintiff to file the present civil suit while the criminal proceedings were in progress. The defendants' right of silence in the criminal proceedings remained intact and exercisable by them at the appropriate time. There was no miscarriage of justice nor prejudice on the part of the defendants when this court granted the stay of the civil proceedings. All the parties agreed that the burden of proof in a criminal trial differ from that of a civil suit. The documents produced during the criminal trial must be made available during the hearing of the present suit and the plaintiff certainly cannot produce those documents while the criminal trial was in progress. In so far as the criminal trial was concerned, the trial court at the sessions level hold the reins and must ensure that the defendants be given a fair trial. It was within the realm of this court to control the civil suit and, on the balance of justice, I granted encl 77, paras (1) and (2) forthwith.

[21] Pausing here, it is plain that there is a critical distinction between the *Jefferson* case and this stay application in that the stay is sought by the appellant, the plaintiff in the civil suit. Contrary to the plaintiff in *Jefferson*, the first respondent herein suffered no prejudice at all from a stay of the civil suit because he was the defendant. As the criminal proceedings had already been set down for trial, it would, to use the words of Megaw LJ in *Jefferson*, be 'that if the criminal proceedings were likely to be hearing in a very short time … it would be fair and sensible to postpone the hearing of the civil action'. In our opinion, there was a good deal of substance in the argument put forward by learned counsel for the appellant which we readily accepted. It must be emphasised that a stay of the proceedings in the civil suit would also avoid the potentially embarrassing outcome, in the form of conflicting decisions on the same facts by the two courts hearing the criminal proceedings and the civil suit, which could arise if the sessions court hearing the criminal proceedings convicted the first

respondent, whilst the High Court concurrently hearing the civil suit dismissed the appellant's claim. We note the proximity of the hearing dates. The criminal proceedings which were initially set for a seven day hearing were rescheduled to 1–13 December 2016 while the civil suit remained as scheduled, which is, 6–9 December 2016 with follow up dates in February 2017. With these dates, clearly we have a situation where both the criminal proceedings and the civil suit would be heard almost simultaneously. The appellant's resources would inevitably be stretched as it was clear to us that the same resources and witnesses would be involved. There was moreover so much commonality of facts and issues as well as a strong likelihood of overlap in the evidence in both the criminal proceedings and the civil suit although the burden of proof differed in each set of proceedings that would make conflicting decisions potentially an ineluctable fact.

[22] This possibility of inconsistent findings by both courts on the same facts could not therefore be dismissed as purely speculative and one that could be resolved on appeal. The High Court also erroneously held that the appellant 'had waited six years' after the civil suit was commenced before commencing the criminal proceedings against the first appellant implying that it was made a tad late in the day. This finding, with due respect to the learned judge, was also misplaced because His Lordship did not seem to realise that the decision to commence the criminal proceedings was made by the attorney general in the exercise of his constitutional function pursuant to art 145(3) of the Federal Constitution and not the appellant who was devoid of such power and was thus totally out of the appellant's control. Once that decision had been made the conduct of the prosecution, by virtue of the aforementioned constitutional provisions, remains with the attorney general. It is under these peculiar circumstances that the special circumstances are said to arise. Therefore, the reasons put forth by the appellant were genuine, cogent and real and in the event that both proceedings are heard concurrently, it is likely that such course taken is likely to result in a compromise of the interests of justice.

[23] For all these reasons, we could not accede to the submission urged for the respondent. It was plain that the stay application was eminently one which required the exercise of discretion. We found that the learned judge had exercised his discretion wrongly and we made this finding as it was obvious to us that the grounds discussed above amounted to special circumstances upon which His Lordship ought to have exercised his discretion to grant the stay application as prayed. We accordingly held that the appeal should be allowed. The order of the High Court dated 22 August 2016 was set aside and substituted with an order that the civil suit be stayed until the conclusion of the criminal proceedings in the sessions court. We made no order as to costs.

A *Appeal allowed; order of High Court set aside and substituted with an order that the civil suit be stayed until the conclusion of the criminal proceedings in the sessions court.*

Reported by Dzulqarnain Ab Fatar

B

C

D

E

F

G

H

I